Supreme Court, U.S.
FILED
MAY 6 1999
CLERK

(3)

No. 98-1527

IN THE

Supreme Court of the United States

MARK KNAUST, BARBARA KNAUST and HERMAN KARL KNAUST, II,

Petitioners,

v.

THE CITY OF KINGSTON, NEW YORK, THE CITY OF KINGSTON PLANNING BOARD, THE CITY OF KINGSTON LOCAL DEVELOPMENT CORPORATION and THE UNITED STATES DEPARTMENT OF COMMERCE, FOR AND THROUGH THE ECONOMIC DEVELOPMENT ADMINISTRATION, WILBUR F. HAWKINS, DEPUTY ASSISTANT SECRETARY FOR ECONOMIC DEVELOPMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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FURTHER REASONS FOR GRANTING THE WRIT

NEPA specifically mandates that federal agencies may not rely upon local environmental decisionmaking in taking federal action. The federal government may not even defer to an Environmental Impact Statement compiled by a state agency, save a few itemized exceptions which bear indicia of critical analysis, none of which is present here. 42 U.S.C. § 4332(d).

Just as Respondent Department of Commerce deferred to the insular environmental analysis of the Kingston Respondents in derogation of NEPA[1] it now defers to their opposition before this Court. In so doing, there is no counterstatement of facts before this Court relating to the deficient federal action and decisionmaking.

The City of Kingston argues that the federally-funded sewer may not have a significant impact upon the Knaust Lakes, referencing materials that are not in the record below.[2]

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1. No local environmental decision could be more preordained and unworthy of deference than that made here. The applicant for the Kingston Business Park project was the City of Kingston Local Development Corporation, through its president, T. R. Gallo. The local government that approved the project, rezoned the Business Park property from residential to manufacturing and authorized the sewer at issue here was the City of Kingston, through its Mayor, T. R. Gallo, the same man. These parties are represented jointly before this Court self-styled as the "Kingston Respondents."

2. The New York State Department of Environmental Conservation did not issue any permit for the sewer. The City's statement that it has "voluntarily elected" to comply with a stormwater permit is not in the record, nor does the Federal Clean

(Cont'd)

These arguments do not confront the central facts: The federal government declined to prepare an Environmental Impact Statement in support of its funding of the sewer and the Respondents moved quickly to build it while this case was pending, thus engineering the unique mootness finding below.

I. RESPONDENTS BRIEF IN OPPOSITION FAILS TO DISTINGUISH OR RATIONALIZE THE SIGNIFICANT SPLIT IN THE CIRCUITS

The teaching of the decision below is that federal agencies in the Second Circuit may ignore NEPA, take major federal action, and blaze ahead thus avoiding compliance and judicial review. Every other circuit that has confronted this direct behavior has declined to find mootness, if only because such a finding encourages lawlessness and derogates federal jurisdiction over a seminal federal environmental statute.

The Kingston Respondents dredge up a few old mining cases which have nothing to do with the current split in authority and are readily distinguishable. In *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1987) plaintiffs belatedly sought relief against mining actions that were not only long completed, but irreversible. Distinguishing *Columbia Basin Land Protection v. Schlesinger*, 643 F.2d

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Water Act apply to subsurface discharges. 33 U.S.C. § 1362(7). *See Brief in Opposition*, pp. 5, and 4. Absolutely nothing in the record contradicts Mr. Rubin's report of a hydraulic connection between the sewer and the Knaust Lakes. Finally the record reflects that the maker of the "vortex" unit admits its limited, marginal utility and concedes that significant pollution bypasses the unit.

585 (9th Cir. 1981), cited in support of the Petition herein, the Ninth Circuit held that "(U)nlike a power transmission line, a completed mining operation cannot be moved. The impacts of the Plan mines are not remediable since we cannot order that the Plans be 'unmined' " (citations omitted).[3] *Accord*, *Park County Resource Council, Inc. v. Department of Transportation*, 817 F.2d 609 (10th Cir. 1987), *overruled on unrelated grounds*, 956 F.2d 970, 973 (10th Cir. 1992) (NEPA claim held moot when drilling at site abandoned, and reclamation of mine completed).[4]

Here, the storm sewer generates ongoing, daily pollution. A careful investigation of the environmental effects of the federal funding decision to build the sewer could avert or abate some, if not all of the pollution at issue. Indeed, the sewer could be diverted to the Hudson River, where the EDA first thought the sewer was going to go when it initially issued a Finding of No Significant Impact ("FONSI"). Moreover, the conflicting circuit decisions recognize that a violation of NEPA that is timely presented cannot become moot until NEPA compliance is achieved.

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3. Notably, the *Sierra Club* court recognized that the decision in *Columbia Basin* represents, "the preeminent law with respect to mootness in a NEPA claim." 857 F.2d at 1318.

4. Respondent's reliance upon *South East Lake View Neighbors v. Department of Housing and Urban Development*, 685 F.2d 1027 (7th Cir. 1982) is also misplaced. That case specifically recognized that if, after construction and funding, a NEPA plaintiff "allege(s) the existence of the risk of a new environmental injury, whose appearance could be averted through a careful investigation of the environmental effects of the funding decision," the case is not moot. 685 F.2d at 1039. That is precisely this case.

II. THIS COURT HAS JURISDICTION

The assertion by the Kingston Respondents that the order below is interlocutory and thus beyond review is simply incorrect. The courts below fully decided this NEPA case on the merits and there is nothing more for the courts below to say about the NEPA claim or the Respondent United States Department of Commerce. Justice Scalia's decision denying the Petition for certiorari in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) is not to the contrary. There, the circuit court had remanded the case for a remedial determination. Here, the NEPA claim has been finally decided below. Therefore, unlike *Virginia Military*, the district court may make no further decision affecting the matters sought to be presented to this Court. The conflict which justifies this Court's review cannot be altered below, therefore this case should be heard.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully pray that this Court grant review in order to secure uniformity of decision and to provide strength and definition to NEPA, the cornerstone of federal environmental law.

Respectfully submitted,

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